

Public Prosecutor v Tony Omorodion Ogboin

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL
NO 45A-46-05 OF 2017
NOORIN BADARUDDIN J
10 MAY 2021

Criminal Procedure — Acquittal or discharge — Drug Trafficking — Accused charged with trafficking of 10,262g of methamphetamine — Whether prosecution failed to prove ‘exclusive possession’ of drugs — Whether accused had knowledge of drugs — Whether accused had actual custody and control of drugs — Whether prima facie case established — Whether there were gaps in prosecution’s case — Whether accused’s defence of wilful blindness sustainable

The accused was charged for trafficking 10,262g of methamphetamine, an offence under s 39B of the Dangerous Drugs Acts 1952 (‘the DDA’) and punishable under s 39B(2) of the DDA. The raiding officer (‘PW8’) with his 11-man police team converged Pangsapuri Suria Permai (‘the said address’) following information of drugs distribution by a Nigerian national at the said address. PW8 stated that he saw the accused moving seven wooden crates in front of the elevator at the ground floor of Block B (‘Block B’) at the said address. PW8 inspected the wooden crates and found that each wooden crate consisted of a brown carton box and inside each carton box was a white polystyrene box that kept a ceramic horse statue. Upon inspecting one of the ceramic horse statues, PW8 found four black lumps cemented inside the ceramic horse statue. He freed one of the lumps from the cement and identified it to be a black sellotape fortifying a sheet of aluminium foil that wrapped around a transparent plastic packet containing substance believed to be dangerous drugs of methamphetamine. Upon the discovery, the accused was arrested and all the seven wooden crates and the contents were seized. PW8 had also seized a bill of lading, a handphone and two keys from the accused. Upon discovery of two sets of keys, the accused was taken to the said address again. PW11 led by the accused went to unit B-10-03 (‘the apartment’) of the said address. According to PW11, there was no occupant in the apartment unit and no clothing was found therein. Thereafter, the accused led PW11 to another location which address was 15-3 Villa Mas, Jalan Pipit, Puchong (‘Villa Mas’) said to be the house where the accused lived at the material time. No items were seized from the accused from the inspection at Villa Mas. PW8 then conducted a thorough inspection on the seven white and golden ceramic horse statues and discovered four similar black sellotape lumps inside each ceramic horse statue that were plastered with cement. All 28 plastic packets were taken out from the seven ceramic horse statues were sent to the Chemistry Department

- A for examination and analysis. The chemist ('PW1') certified that the substance inside the 28 plastic packets were 10,262g of methamphetamine. The accused contended that the seven wooden crates did not belong to him but instead belonged to an individual by the name of 'Terry' or 'Alex Joe'. 'Alex Joe' was the name stated in the bill of lading as the consignee to the seven wooden crates
- B sent to the said address by PW7. It was the accused's further contention that Alex Joe's real name was Abdullah Hammad who was his acquaintance and who had instructed him to receive the seven wooden crates to be taken to the apartment unit B-10-03 at the said address. The prosecution, on the other
- C hand, submitted that the accused had the mens rea possession of the impugned drugs hidden in the seven ceramic horse statutes and the presumption of trafficking was triggered and could be rightly invoked on him. In respect of knowledge, the prosecution submitted that the conduct of the accused before and after claiming the wooden crates from PW7 stand as proof of his
- D knowledge that there were contrabands with him.

Held, acquitting and discharging accused:

- (1) There was reasonable doubt as to the accused's knowledge of the impugned drugs and there was reasonable doubt as to whether the accused had the *animus possidendi* ie that he had the intention of dealing with the impugned drugs as if they belonged to him should he see any occasion to do so. This was because the impugned drugs were found in plastic packages sealed and cemented in the ceramic horse statutes and kept in the seven big wooden crates. Also, the bill of lading stated that the consignee was 'Alex Jo' and not the accused. There was also a handphone number ('the said number') stated on the bill of lading. As such, the name 'Alex Jo' could not be gainsaid to be fictitious. PW7 also testified that the accused was seen lingering around the said address and talking on his handphone before he came to accept the wooden crates, it could safely be inferred that he was talking to someone who had requested him to receive the seven wooden crates (see paras 33–35).
- (2) The evidence of PW7 clearly showed that he had given the seven wooden crates to the accused only after he had spoken to someone whose handphone number was as stated on the bill of lading under the name of Alex Jo. PW7 had further confirmed that the wooden crates were sealed at the time when he surrendered them to the accused and as such leaving no room to infer that the accused would know the contents of the same. In the circumstances, the prosecution's argument that the characters, Terry, Alex Joe or Abdullah Hammad were fictitious and that the accused's defence of wilful blindness could not be sustained was untenable (see paras 37 & 39).
- (3) The court found that the defence raised by the accused as early as through his statement under s 112 of the Criminal Procedure Code was given to

the police could not be said to be fanciful. The character of either Abdullah Hammad, Terry or Alex Jo could be said to be fictitious solely on the confirmation received from the immigration department via P33. The problem was with the fact that no thorough investigation had been conducted by the police to enable this court to negate the possibility of other person having possession of the impugned drugs (see para 42).

- (4) Temporary custody and control of the wooden crates on the part of the accused did not amount to him having knowledge of the contraband. There was nothing to hinder the police to further investigate as to the existence of Abdullah Hammad or Terry or Alex Jo for that matter as the burden was on the prosecution to exclude the possibility of access by others to the said drugs. There was no duty on the accused to prove possibility of access by others to the dangerous drugs. It was trite that to sustain a conviction either for the offence of possession or trafficking, exclusivity of possession of the impugned drugs must be proved by the prosecution. If there were gaps, the prosecution must close the gaps. It was not for the accused to supplement the case for the prosecution (see para 43).
- (5) Without direct evidence of trafficking the prosecution must prove possession where the possibilities that other individuals might have access to the drugs must be excluded. The prosecution had failed to prove possession on the part of the accused. Proximity with the impugned drugs however close, without more was insufficient for knowledge to be inferred. The prosecution had only established that the accused was temporarily having custody of the seven wooden crates. In fact and on the totality of the evidence adduced by the prosecution, the accused could not even be said to have the custody and control let alone mens rea possession that could clearly and irresistibly point to his knowledge of the drugs contained in the seven wooden crates (see para 45).
- (6) The prosecution's case was tainted with doubts, gaps and inference favourable to the accused. In totality and having considered the cumulative effect of the evidence, this court was left in a doubt. If the accused were to be called to enter his defence and he chose to remain silent, this court would not find it safe to convict him. Prosecution had failed to establish a prima face case against the accused. Defence ought not to be called just to entertain some doubts and to seek clarification. Defence could only be called to rebut the truth of the prosecution's case. There was no necessity for this court to hear rebuttal evidence from the accused (see paras 46–47).

[Bahasa Malaysia summary]

Tertuduh telah didakwa mengedar 10,262g methamphetamine, suatu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB') dan boleh

- A di hukum di bawah s 39B(2) ADB. Pegawai serbuan ('PW8') dengan pasukan 11 orang polis menyerbu Pangsapuri Suria Permai ('alamat tersebut') berdasarkan maklumat pengedaran dadah oleh seorang warganegara Nigeria di alamat tersebut. PW8 menyatakan bahawa beliau melihat tertuduh membawa
- B tujuh peti kayu di hadapan lif di tingkat bawah Blok B ('Blok B') di alamat tersebut. PW8 memeriksa peti kayu tersebut dan mendapati bahawa setiap peti kayu tersebut terdiri daripada kotak kad bod coklat dan di dalam setiap kotak kad bod tersebut mengadungi kotak plastik putih yang menyimpan patung kuda seramik. Setelah memeriksa salah satu patung kuda seramik tersebut, PW8 menjumpai empat gumpalan hitam yang disimen di dalam patung kuda
- C seramik tersebut. Beliau melepaskan salah satu gumpalan dari simen tersebut dan mengenal pasti ianya adalah pita pelekat hitam yang menguatkan sehelai kerajang aluminium yang melilit paket plastik lutsinar yang mengandungi bahan dipercayai dadah berbahaya iaitu methamphetamine. Setelah penemuan
- D tersebut, tertuduh telah ditangkap dan ketujuh peti kayu dan kandungannya dirampas. PW8 juga telah merampas bil muatan, telefon bimbit dan dua kunci dari tertuduh. Setelah penemuan dua set kunci tersebut, tertuduh dibawa ke alamat tersebut sekali lagi. PW11 yang dibawa oleh tertuduh pergi ke unit B-10-03 ('pangsapuri tersebut') alamat tersebut. Menurut PW11, tidak ada
- E penghuni di unit pangsapuri tersebut dan pakaian tidak ditemukan di dalamnya. Kemudiannya, tertuduh membawa PW11 ke lokasi lain yang beralamat di 15-3 Villa Mas, Jalan Pipit, Puchong ('Villa Mas') yang dikatakan sebagai rumah tempat tertuduh tinggal pada masa material. Tidak ada barang yang dirampas dari tertuduh semasa pemeriksaan di Villa Mas. PW8 kemudian
- F melakukan pemeriksaan menyeluruh terhadap tujuh patung kuda seramik putih dan emas dan menemukan empat gumpalan pita pelekat hitam serupa di dalam setiap patung kuda seramik yang dilapisi dengan simen. Kesemua 28 paket plastik dikeluarkan dari ketujuh patung kuda seramik dihantar ke Jabatan Kimia untuk pemeriksaan dan analisa. Ahli kimia ('PW1')
- G mengesahkan bahawa bahan di dalam 28 paket plastik tersebut adalah 10.262g metamfetamin. Tertuduh menghujahkan bahawa tujuh peti kayu tersebut bukan miliknya, sebaliknya milik individu bernama 'Terry' atau 'Alex Joe'. 'Alex Joe' adalah nama yang dinyatakan dalam bil muatan sebagai penerima
- H tujuh peti kayu yang dikirim ke alamat tersebut oleh PW7. Ia adalah penghujahan tertuduh selanjutnya yang mengatakan bahawa nama sebenarnya Alex Joe adalah Abdullah Hammad yang merupakan kenalannya dan yang telah mengarahkan beliau untuk menerima tujuh peti kayu tersebut untuk dibawa ke unit pangsapuri B-10-03 di alamat tersebut. Sebaliknya, pihak pendakwaan menyatakan bahawa tertuduh mempunyai mens rea pemilikan
- I dadah yang dipersoal disembunyikan dalam ketujuh patung kuda seramik dan anggapan pengedaran dimulakan dan boleh diguna pakai terhadapnya. Berkenaan dengan pengetahuan, pihak pendakwaan menyatakan bahawa tingkah laku tertuduh sebelum dan selepas menuntut peti kayu dari PW7 adalah bukti pengetahuannya bahawa barang larangan padanya.

Diputuskan, membebaskan dan melepaskan tertuduh:

- (1) Terdapat keraguan yang munasabah mengenai pengetahuan tertuduh terhadap dadah yang dipersoal dan terdapat keraguan munasabah mengenai sama ada tertuduh mempunyai *animus possidendi* iaitu bahawa beliau mempunyai niat untuk mengedar dadah tersebut seolah-olah ia adalah miliknya sekiranya beliau mempunyai sebarang peluang untuk melakukannya. Ini kerana dadah yang dipersoal tersebut dijumpai dalam bungkusan plastik yang ditutup dan disimen dalam patung kuda seramik dan disimpan di dalam tujuh peti kayu besar. Selain itu, bil muatan menyatakan bahawa penerima barang tersebut adalah 'Alex Jo' dan bukannya tertuduh. Terdapat juga nombor telefon bimbit ('nombor tersebut') tertera pada bil muatan. Oleh itu, nama 'Alex Jo' tidak boleh dikatakan sebagai rekaan. PW7 juga memberikan keterangan bahawa tertuduh dilihat mundar-mandir di sekitar alamat tersebut dan bercakap pada telefon bimbitnya sebelum beliau menerima peti kayu tersebut, ianya selamat untuk disimpulkan bahawa beliau sedang bercakap dengan seseorang yang memintanya untuk menerima tujuh peti kayu tersebut (lihat perenggan 33–35).
- (2) Keterangan oleh PW7 jelas menunjukkan bahawa beliau telah memberikan tujuh peti kayu tersebut kepada tertuduh hanya setelah beliau bercakap dengan seseorang yang mana nombor telefon bimbitnya adalah seperti yang tertera pada bil muatan dengan nama Alex Jo. PW7 kemudian mengesahkan bahawa peti kayu tersebut ditutup semasa beliau menyerahkannya kepada tertuduh dan dengan itu tidak memberinya ruang untuk membuat kesimpulan bahawa tertuduh mengetahui isi kandungannya. Dalam keadaan itu, hujah pihak pendakwa bahawa watak, Terry, Alex Joe atau Abdullah Hammad adalah rekaan dan bahawa pembelaan tertuduh terhadap kebutaan disengaja tidak terpakai tidak dapat dipertahankan (lihat perenggan 37 & 39).
- (3) Mahkamah mendapati bahawa pembelaan yang dibangkitkan oleh tertuduh seawal melalui pernyataannya di bawah s 112 Kanun Tatacara Jenayah yang diberikan kepada polis tidak boleh dikatakan rekaan. Watak Abdullah Hammad, Terry atau Alex Jo boleh dikatakan rekaan semata-mata berdasarkan pengesahan yang diterima dari Jabatan Imigresen melalui P33. Masalahnya adalah dengan fakta bahawa tidak ada siasatan menyeluruh yang dijalankan oleh pihak polis untuk membantu mahkamah ini dalam menolak kemungkinan terdapat orang lain yang memiliki dadah yang dipersoal (lihat perenggan 42).
- (4) Penjagaan dan kawalan sementara peti kayu tersebut di pihak tertuduh tidak terjumlah kepada beliau mempunyai pengetahuan tentang barang larangan. Tidak ada yang menghalang pihak polis untuk menyiasat lebih lanjut mengenai kewujudan Abdullah Hammad atau Terry atau Alex Jo bagi perkara tersebut kerana beban pada pihak pendakwaan untuk

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- A mengecualikan kemungkinan akses oleh orang lain ke atas dadah tersebut. Tidak ada tanggungjawab bagi tertuduh untuk membuktikan kemungkinan akses oleh orang lain ke atas dadah berbahaya tersebut. Ia adalah jelas bahawa untuk mempertahankan sabitan sama ada atas kesalahan memiliki atau mengedar, milikan eksklusif dadah yang
- B dipersoal tersebut harus dibuktikan oleh pihak pendakwaan. Sekiranya terdapat jurang, pihak pendakwaan mesti menutup jurang tersebut. Ia bukan untuk tertuduh bagi melengkapkan kes pendakwaan (lihat perenggan 43).
- C (5) Tanpa bukti langsung pengedaran, pihak pendakwaan mesti membuktikan milikan di mana kebarangkalian terdapat individu lain yang mungkin mempunyai akses ke atas dadah tersebut mesti dikecualikan. Pihak pendakwaan gagal membuktikan milikan pada pihak tertuduh. Jarak dengan dadah yang dipersoal walaupun dekat, tanpa pengetahuan yang lebih untuk disimpulkan. Pihak pendakwaan
- D hanya membuktikan bahawa tertuduh mempunyai hak penjagaan sementara tujuh peti kayu tersebut. Sebenarnya dan berdasarkan keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan, tertuduh bahkan tidak boleh dikatakan mempunyai penjagaan dan
- E kawalan apatah lagi mens rea milikan yang dengan jelas dan tanpa ragu-ragu dapat menunjukkan pengetahuannya pada dadah yang terdapat dalam tujuh peti kayu tersebut (lihat perenggan 45).
- F (6) Kes pendakwaan dicemari dengan keraguan, jurang dan kesimpulan yang berpihak kepada tertuduh. Secara keseluruhan dan setelah mempertimbangkan kesan kumulatif keterangan, mahkamah ini mempunyai keraguan. Sekiranya tertuduh dipanggil untuk membela diri dan beliau memilih untuk berdiam diri, mahkamah ini tidak akan selamat untuk menjatuhkan beliau hukuman. Pendakwaan gagal membuktikan kes prima facie terhadap tertuduh. Pembelaan tidak harus
- G dipanggil hanya untuk melayan apa-apa keraguan dan meminta penjelasan. Pembelaan hanya dapat dipanggil untuk membantah kebenaran kes pendakwaan. Tidak ada keperluan bagi mahkamah ini untuk mendengar keterangan bantahan dari tertuduh (lihat perenggan 46–47).]
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Cases referred to

- Abdullah Zawawi v PP* [1985] 2 MLJ 16, SC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (folld)
Chan Pean Leon v PP [1956] 1 MLJ 237 (folld)
- I *Ibrahim Mohamad & Anor v PP* [2011] MLJU 1491; [2011] 4 CLJ 113, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (folld)
Magendran all Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ Rep 221, SC (refd)

PP v Saiman & Ors [1971] 2 MLJ 16 (refd)

Rahmani Ali Mohamad v PP [2014] 6 MLJ 525; [2014] 7 CLJ 405, CA (refd)

Teper v R [1952] AC 480, PC (refd)

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Legislation referred to

Criminal Procedure Code ss 112, 180

Dangerous Drugs Acts 1952 ss 2, 39B, 39B(2), First Schedule

Evidence Act 1950 s 114(g)

B

Shukor bin Abu Bakar (Selangor Deputy Public Prosecutor's Office) for the prosecution.

Afifuddin bin Ahmad Afifi (Salehuddin Saidin & Assoc) for the accused.

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Noorin Badaruddin J:

[1] Tony Omorodion Ogboin ('the accused') was charged for trafficking 10,262g of methamphetamine, an offence under s 39B of the Dangerous Drugs Acts 1952 ('the DDA') and punishable under s 39B(2) of the DDA. The accused claimed trial to the charge.

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[2] The prosecution called 13 witnesses to establish a prima facie case. At the close of the prosecution's case, this court discharged and acquitted the accused. The reasons now follow.

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THE CHARGE

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Bahawa kamu pada 12 haribulan Mei 2016 pada jam lebih kurang 3.00 petang di hadapan lif lobi Blok B, Pangsapuri Suria Permai, Persiaran Permai Sentosa, Bandar Putra Permai, 40300 Seri Kembangan, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Methamphetamine seberat 10,262 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

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THE PROSECUTION CASE

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[3] On 12 May 2016, the raiding officer, Inspector Mohd Azrin bin Abd Manan ('PW8') with his 11-man police team converged at the address stated in the charge ('the said address') following information of drugs distribution by a Nigerian national at the said address. At about 3pm, PW8 stated that he saw the accused moving seven wooden crates in front of the elevator at the ground floor of Block B ('Block B') at the said address. The accused was stated to have positioned one of the wooden crates in the elevator to block the elevator's door from closing. PW8 then approached the accused and introduced himself as a policeman. According to PW8, the accused looked nervous and anxious. PW8

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A had asked for the accused's passport and the accused produced exh P21(A), a Nigerian passport under the name of Tony Omorodion Ogboin.

[4] PW8 had inspected the wooden crates in the presence of the accused. Each wooden crate consists of a brown carton box and inside each carton box is a white polystyrene box that keeps a ceramic horse statue. PW8 then took out and inspected one of the ceramic horse statues (P22(7B)) from one of the wooden crates (P22(7)). He broke the ceramic horse statue and found four black lumps cemented inside the ceramic horse statue. He freed one of the lumps from the cement (P8(A1)) and identified it to be a black sellotape fortifying a sheet of aluminium foil that wraps around a transparent plastic packet containing substance believed to be dangerous drugs of methamphetamine.

D [5] Upon the discovery, the accused was arrested and all the seven wooden crates (P22 (1–7)) and the contents were seized. PW8 had also seized a bill of lading (P21(D)), a handphone (P21(B)) and two keys (P21(C)) from the accused outside the elevator of Block B.

E [6] The accused and all items seized were taken to IPD Serdang. At the IPD Serdang, PW8 conducted a thorough inspection on the seven white and golden ceramic horse statues and discovered four similar black sellotape lumps inside each ceramic horse statue that were plastered with cement. Each lump protects aluminium sheets that were wrapped around a transparent plastic. All 28 plastic packets were taken out from the seven ceramic horse statues and contained substance believed to be methamphetamine weighing 12,098g.

G [7] After the arrest, the accused was taken to the said address again upon discovery of two sets of keys from his pants during the body search on him conducted by PW8. This time around, DSP Soh Tong Keng ('PW11') led by the accused went to the apartment unit B-10-03 ('the apartment') located on the tenth floor of Block B at the said address. Using the keys (P21(C)), PW11 managed to unlock the pad lock of the grill door and gained access to the apartment. According to PW11, there was no occupant in the apartment unit and no clothing was found therein.

I [8] Thereafter, the accused led PW11 and his team to another location which address was 15–3 Villa Mas, Jalan Pipit, Puchong ('Villa Mas') said to be the house where the accused lived at the material time. A police report was lodged by PW11 relating to the inspection at Villa Mas. No items were seized from the accused from the inspection at Villa Mas.

[9] The investigating officer, Inspector Mohd Raqib ('PW12'), had sent all the 28 plastic packets containing substance believed to be dangerous drugs to

the Chemistry Department for examination and analysis. The chemist, Dr Vanitah Kunalan ('PW1'), carried out the examination and analysis and certified that the substance contain 10,262g of methamphetamine.

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THE PROSECUTION'S SUBMISSION

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[10] It is the prosecution's submission that the accused was in possession of the seven wooden crates containing the seven white and golden ceramic horse statutes that were plastered with 28 packets of methamphetamine. According to the prosecution, at the time of the raid, the accused was the only person seen handling the wooden crates. It was contended that the accused was the one who came forward to claim all the seven wooden crates from Mr Toh Eng Ann ('PW7'), a lorry driver from the company known as Yonex International who was responsible in delivering the seven wooden crates at the said address on the day the accused was arrested. The prosecution highlighted that PW7 had to wait for 20 to 30 minutes before the accused came to receive the seven wooden crates. PW7 later dropped the seven wooden crates at the entrance of Block B at the said address after handing over the bill of lading (P21(D)) to the accused. The prosecution further argued that PW7 had confirmed that it was the accused who collected the seven wooden crates and the bill of lading P21(D). The accused then had informed PW7 that he had left his passports at the apartment upstairs at Block B when PW7 had asked to see the accused's identification before releasing the consignment to him.

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[11] The prosecution further stressed that PW8 had confronted the accused in front of the elevator when he was moving and about to stack the seven wooden crates into the elevator. The prosecution stressed upon the fact that there was no other person but the accused who was seen dealing with the seven wooden crates after the delivery by PW7 and upon being confronted by PW8, the accused was nervous and anxious even before PW8 inspected the seven wooden crates and broke one of the ceramic horse statutes and discovered the impugned drugs.

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[12] It was argued that the accused was the person who had the power to deal with the seven wooden crates to the exclusion of other persons after he claimed them from PW7 who had delivered them at the said address.

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KEY CONTENTIONS OF THE DEFENCE

[13] On behalf of the accused, the learned counsel submitted that the prosecution failed to show that the accused was in custody and control of the impugned drugs found in the ceramic horse statutes as the seven wooden crates containing the impugned drugs did not belong to the accused. It was contended that the prosecution failed to prove 'exclusive possession' of the

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- A impugned drugs on the part of the accused as there exist a probability of possession, custody and control of the impugned drugs by other individual.

- B [14] It was further argued that adverse inference pursuant to s 114(g) of the Evidence Act 1950 must be invoked as the prosecution failed to produce material witness. It was submitted that the police failed to conduct a thorough investigation and such investigation had prejudiced the accused.

FINDINGS

- C *The prima facie test*

- D [15] At the close of the prosecution's case, it would be the duty of this court to consider whether the prosecution has made out a prima facie case against the accused under s 180 of the Criminal Procedure Code. This court is guided by the two notable cases of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321.

- E [16] In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89, the Court of Appeal explained:

- F It is the duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution had made out a prima facie case. He must subject the prosecution evidence to maximum evaluation and ask himself whether he would be prepared to convict the accused on the totality of the evidence contained in the prosecution's case if he were to decide to call upon the accused to enter his defence and the accused had elected to remain silent. If the answer to that question is in the negative, then no prima facie case would have been made out and the accused would be entitled to an acquittal. There was no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case.
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[17] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321, the Federal Court explained further as follows:

- H A prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by evidence in rebuttal. The force of that evidence must, if unrebutted, be sufficient to induce a state of belief that the facts as they stand are as stated in the charge. In order to make a finding the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is unrebutted, and the accused remain silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain silent, which if answered in the affirmative means that a prima facie case has been made out. This requires a consideration of the
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- existence of any reasonable doubt in the prosecution's case, which if it exists, cannot lead to the finding of a prima facie case having been made out. A
- [18] A prima facie case is made out against the accused where the prosecution adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. A maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out. In determining whether at this stage of the trial, a prima facie case has been made out by the prosecution, it is instructive upon the court to scrutinize those evidence adduced on a maximum yardstick in order to determine whether those strands of evidence have satisfied the legal requirements to support a finding of a prima facie case. It becomes necessary as well for this court to consider the gaps and inferences that arose from those circumstantial evidence, in accordance with the principles of law. B C D
- [19] Maximum evaluation is the assessment process for analysing the credibility and reliability as well as the trustworthiness of the evidence of the prosecution. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected. It is also the duty of this court to consider the evidence which favours the defence. E
- [20] In *Téper v R* [1952] AC 480, Lord Normand at p 489 stated: F
It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.
- [21] It is apposite to bear in mind that circumstantial evidence does not depend on hypothesis, or theories, or even speculations. They must give rise to strong inferences so as to become the best evidence. In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, the Federal Court stated: G
The test at the end of the prosecution's case is 'prima facie case' based on a maximum evaluation of evidence. The evidence has to be scrutinized properly and not perfunctorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a prima facie case has not been made out. The defence ought not to be called merely to clear or clarify such doubts. H
- [22] In the instant case a prima facie case is made out against the accused on all the charges preferred against him if the prosecution prove three ingredients of the offences under the DDA. Firstly, the impugned drugs must be dangerous drugs as specified in the First Schedule to the DDA. Secondly, the impugned I

- A drugs were in the possession of the accused and thirdly, the accused was trafficking in the said drugs.

The first ingredient: The identity of the drugs

- B [23] In regards to the identity of the impugned drugs, apart from there being no challenge by the accused, this court is satisfied that nothing is inherently incredible in respect of the chemist's evidence. Dr Vanita Kunalan, (PW1) testified that the results of her examination and analysis as stated in the chemist report dated 14 October 2016 with the laboratory number 16-FR-B-11291
- C (P16) confirmed that the impugned drugs are methamphetamine as defined in s 2 of the DDA weighing 10,262g. PW1 had testified in details as to the methods of her examination and analysis in reaching to her conclusion.

- D [24] The Federal Court in the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ Rep 221, held as follows:

- E ... the court is entitled to accept the opinion of the expert of its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

- F [25] This court is further satisfied that there is no breach in the evidential chain of movement of the impugned drugs from the time of seizure until their production in court elicited from the testimonies of the chemist (PW1), the raiding officer (PW8) and the investigating officer (PW12). As such, the prosecution had proven the first ingredient of the charge against the accused.

The second ingredient: Possession

- G [26] In regards to possession, this court is guided by the often-quoted case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, where Thomson J elaborated as follows:

- H Much difficulty arises from a failure to appreciate that in reality there are two separate questions involved. The first is whether the accused party was in possession of the article in question and the second by reason of the application of the maxim *actus non facit reum nisi mens sit reus* is whether he had knowledge of the nature of the thing possessed.

- I 'Possession' itself as regards the criminal law is described as follows in Stephen's Digest (9th Ed p 304):

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may by presumed to intend to do so in case of need.

- To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. A
- Once possession is proved, then before the accused person can be convicted it is necessary in addition to prove mens rea. And for this purpose as was pointed out by Gordon-Smith Ag CJ. in the case of *Toh Ah Lam and MakjThim v Rex* [1949] 1 MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed. B
- [27] The Federal Court in *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113 held: C
- The law is settled that having only custody or control over the said drugs is insufficient to establish 'possession'. The physical act or custody must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. D
- [28] It was contended by the prosecution that the accused was in actual possession of the impugned drugs at the time of the raid considering the evidence of PW7, PW8 and PW11. It was argued that it was the accused who came forward to claim the seven wooden crates and later moved them in front of the elevator from the entrance of Block B where PW7 dropped them off. PW7 had testified that he was waiting at the entrance of Block B for about 20 to 30 minutes. He saw the accused lingering around the area and was communicating on the handphone with someone before the accused came to receive the seven wooden crates. PW7 asked for the accused's identification card to which the accused responded that he had left the passport at his apartment 'upstairs'. E
- [29] The prosecution also relied on the evidence of the accused's conduct where the accused was stated to have looked nervous and anxious upon being confronted by PW8. Hence it was submitted that the prosecution had sufficiently proved that the accused had the mens rea possession of the impugned drugs hidden in the seven ceramic horse statues and the presumption of trafficking is triggered and can be rightly invoked on him. F
- [30] In respect of knowledge, the prosecution submitted that the conduct of the accused before and after claiming the wooden crates from PW7 stand as proof of his knowledge that there were contrabands with him. G
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- A [31] It was the accused's defence that the seven wooden crates did not belong to him but instead they belonged to an individual by the name of 'Terry' or 'Alex Joe'.
- B [32] It is important to note that 'Alex Joe' is the name stated in the bill of lading P21(D) as the consignee to the seven wooden crates sent to the said address by PW7. It is the accused's defence further that Alex Joe's real name is Abdullah Hammad who was his acquaintance and who had instructed him to receive the seven wooden crates to be taken to the apartment unit B-10-03 at the said address.
- C [33] It is the testimony of the raiding officer PW8 that the accused was apprehended at the time he was handling the seven wooden crates in front of the elevator. However, this court finds there is reasonable doubt as to the accused's knowledge of the impugned drugs. There is reasonable doubt as to whether the accused had the *animus possidendi* ie that he had the intention of dealing with the impugned drugs as if they belonged to him should he see any occasion to do so.
- D [34] This court says so as firstly, the impugned drugs were found in plastic packages sealed and cemented in the ceramic horse statues and kept in the seven big wooden crates. Secondly, the bill of lading P21(D) stated that the consignee is 'Alex Jo' and not the accused. There was also a handphone number stated on the bill of lading P21(D):016-3854779 ('the said number'). It is important to note that PW7 testified that he had called and spoke to a person using the said number on the day he delivered the seven wooden crates to the said address. As such, the name 'Alex Jo' cannot be gainsaid to be fictitious. Further, the said handphone number was not the number that was registered under the accused's name. The handphone number of the accused which was obtained from the sim card of his handphone seized by PW8 on the day of incident was 016-9166238. PW7 confirmed that he did not call the number 016-9166238 while he was waiting at the said address when he made inquiry as to the recipient of the seven wooden crates on the day of incident.
- E [35] Thirdly, when PW7 testified that the accused was seen lingering around the said address and talking on his handphone before he came to accept the wooden crates, it can safely be inferred that he was talking to someone who had requested him to receive the seven wooden crates. This particular evidence from PW7 is consistent with the accused's defence that at around 2.30pm on the day of incident, his friend Terry called him and had asked him to go to the said address to collect the seven wooden crates. In his statement recorded by the police pursuant to s 112 of the Criminal Procedure Code, the accused stated as follows:
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Q: Tell me what happen on 13.5.2016?

A: On that morning im sleeping in my room ... my friend Enest wake up me tell no food to eat today. After that I call Terry which I know last 2 month at football field Puchong. Arround 1100 hrs im call Terry ask money for eat food. Later Terry tell me to come and take RM50 money to buy food. Around 12 afternoon im take taxi and go Giant Supermarket near by Pasar Borong Seri Kembangan. After reach Giant Supermarket I saw Terry out side Giat Supermarket. On that Terry ask me to help to carry wooden box to his house which the wooden box which keep nearby the lift of that kondominium. Before to help Terry ... im ask Terry that im hungry need to eat. On that time Terry left me alone at the restoran. While im waiting at the restoran I call Terry and ask where are you ... But Terry answer, he with his friend ... Later call you. Around evening 2.30 pm Terry call me and ask me to come to lift area to help collect the wooden box which near by lift. When I come to lift area and remove the 7 wooden box to the lift suddenly police catch. On that Im holding one bill of loading resit ... after police arrested me and bring me to police station to investigation.

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After that police open every box and found the drugs which hidden in every horse statute. On that im very aghast when I see the drugs.

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Q: Do you know about the drugs that police found?

A: I don't know about anything about the drugs inside wooden box

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[36] Relying on the evidence of the investigating officer PW12, the prosecution argued that the accused had failed to direct the police with information that could lead to the identification of 'Terry', 'Alex Joe' or 'Abdullah Hammad' who was said to be the tenant of B-10-3 where the keys to the apartment were seized from the accused at the time of his arrest. It was contended that the characters, Terry, Alex Joe or Abdullah Hammad are fictitious. Further, the prosecution relied on P33, the confirmation letter from the Immigration Department that confirmed the record of entry of the accused into this country on 17 October 2014 but no record relating to Abdullah Hammad with the passport number of A03479011. The passport number of Abdullah Hammad was stated in the tenancy agreement of the apartment unit B-10-03 exhibited as P23. It is the prosecution's case that the confirmation on the non-existence of Abdullah Hammad at least in Malaysia at the time the accused was arrested or at any other time for that matter render the accused's defence unreliable. The prosecution argued that the defence of wilful blindness by the accused cannot be sustained.

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[37] This court finds that the prosecution's argument is untenable. PW7 had confirmed that he had called the handphone number stated on the bill of lading and not the number belonging to the accused. According to PW7, the person whom he spoke on the handphone had told him that there would be someone receiving the wooden crates from him once he arrived at the said address. The excerpts of PW7's testimony is reproduced as follows:

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S: Di mana Encik berjumpa dengan lelaki yang telefon?

- A J: Sebenarnya orang yang datang ambil barang dari saya bukan orang yang bercakap dengan saya di telefon. Masa saya telefon, dia sudah ada tapi tak mari terima barang. Dia berlegar-legar sudah ada di Kawasan tepi lori tapi dia tak bagitau nak angkat barang itu. Lepas itu saya telefon dia, pertama kali dia cakap on the way. Kali kedua, saya kata kalua tak angkat, saya mau angkat barang tempat lain, lepas itu dia telefon
- B satu kali, lepas itu, budak yang merayau-rayau di kawasan lori tadi nak datang ambil kotak-kotak.

- [38] The evidence of PW7 clearly shows that he had given the seven wooden crates to the accused only after he had spoken to someone whose handphone number was as stated on the bill of lading under the name of Alex Jo. PW7 had further confirmed that the wooden crates were sealed at the time when he surrendered them to the accused and as such leaving no room to infer that the accused would know the contents of the same.

- D [39] Further, apart from the passport number belonging to Abdullah Hammad was stated in the tenancy agreement of the apartment unit B- 10-03 (P23), there were also photograph of Abdullah Hammad, his e-mail and college address attached to the tenancy agreement. PW10, the landlord of the
- E apartment unit B-10-03 had testified that he received the monthly rental from Abdullah Hammad and not the accused. According to PW10 he had in fact spoken to Abdullah Hammad. No search or inquiry was done with the Telco as to the registration of the handphone number stated on the bill of lading. Neither was there any investigation done on the handphone seized from the
- F accused to disprove the accused's defence. In *Rahmani Ali Mohamad v Public Prosecutor* [2014] 6 MLJ 525; [2014] 7 CLJ 405, the Court of Appeal found as follows:

- G [15] Even more, no investigation at all was carried out by PW8 to disprove the appellant's version of fact, particularly concerning Mohd Reza, which was given by the appellant at the earliest possible opportunity. In this regard, PW8 said that he did not investigate the appellant's handphone because 'saya terlepas pandang.' PW8 also said, 'saya tak periksa rekod-rekod panggilan keluar masuk OKT2. Jika disiasat mungkin boleh dapat maklumat lanjut'. The appellant cannot be penalized for lack of ingenuity, negligence or inadvertence on the part of the investigator depriving him of the time- honoured benefit of the doubt (see: *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; [1992] 1 CLJ 39). *The manner in which PW8 had conducted his investigations left many stones unturned and material gaps exists. Based on this omission, an inference in the appellant's favour ought therefore to have been drawn by the learned High Court Judge at the close of the prosecution case* (see: *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Alcontara Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705).

- I [40] In the present case, the investigating officer PW12 in re-examination did state that he conducted investigation on the handphone number belonging to the accused with the Telcos, but it stopped short at that. No details were

given as to the results of the investigation if any. No documentary evidence was tendered to corroborate that such investigation as alleged by PW12 was in fact done.

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[41] The prosecution stressed the fact that the apartment unit B-10-03 was empty which signifies that there was no occupant therein and that it was meant to be a place to keep the impugned drugs. However, this court is not convinced with such evidence as no photographs were taken at the time when PW11 inspected the apartment to corroborate his evidence. Further facts revealed that the accused was not staying at the apartment unit B-10-03 and it was suggested that he obtained the keys to the same apartment from Abdullah Hammad earlier so that he could bring the wooden crates up to the same apartment.

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[42] Be it Abdullah Hammad, or Terry or Alex Jo, this court finds that the defence raised by the accused as early as through his statement under s 112 of the Criminal Procedure Code was given to the police cannot be said to be fanciful. The character of either Abdullah Hammad, Terry or Alex Jo cannot be said to be fictitious solely on the confirmation received from the immigration department via P33. The problem lies with the fact that no thorough investigation had been conducted by the police to enable this court to negate the possibility of other person having possession of the impugned drugs.

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[43] Temporary custody and control of the wooden crates on the part of the accused does not amount to him having knowledge of the contraband. There is nothing to hinder the police to further investigate as to the existence of Abdullah Hammad or Terry or Alex Jo for that matter as the burden is on the prosecution to exclude the possibility of access by others to the said drugs. There is no duty on the accused to prove possibility of access by others to the dangerous drugs. It is trite that to sustain a conviction either for the offence of possession or trafficking, exclusivity of possession of the impugned drugs must be proved by the prosecution. If there are gaps, the prosecution must close the gaps. It is not for the accused to supplement the case for the prosecution (*Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16).

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[44] This court had observed the seven wooden crates brought before the court during the trial. From the observation, this court cannot disagree with the learned defence counsel's contention that it is impossible for the accused alone to lift and handle the seven wooden crates. Even the raiding officer PW7 confirmed that each of the wooden crates were heavy and according to the bill of lading, their gross weight was 130kg. No trolley was found to be with the accused to assist him in carrying the heavy seven wooden crates. In fact, PW7 himself had seek the assistance of one Pakistani by the name of Sedi to assist him in lifting and bringing the seven wooden crates down. This court finds that the circumstances relating to the nature of the seven wooden crates

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A corroborates the accused's version that he was in fact waiting for his friend Terry to come over to the said address to help him in bringing the seven wooden crates to the apartment unit B-10-03.

B [45] Without direct evidence of trafficking the prosecution must prove possession where the possibilities that other individuals might have access to the drugs must be excluded. On the evaluation of the entire evidence at this stage, this court finds that the prosecution has failed to prove possession on the part of the accused. It has been said time and time again, that proximity with the impugned drugs however close, without more is insufficient for knowledge to be inferred. This court finds that at the most the prosecution has only established that the accused was temporarily having custody of the seven wooden crates. It is the finding of this court that in fact and on the totality of the evidence adduced by the prosecution, the accused cannot even be said to have the custody and control let alone mens rea possession that could clearly and irresistibly point to his knowledge of the drugs contained in the seven wooden crates.

CONCLUSION

E [46] The prosecution's case was tainted with doubts, gaps and inference favourable to the accused. In totality and having considered the cumulative effect of the evidence, this court was left in a doubt. If the accused were to be called to enter his defence and he chooses to remain silent, this court would not find it safe to convict him. Prosecution is bound by the evidence of witnesses whom they called and after evaluating the narrative of their evidence, this court found that they have failed to establish a prima face case against the accused on all the four charges preferred against him.

G [47] Defence ought not to be called just to entertain some doubts and to seek clarification. Defence can only be called to rebut the truth of the prosecution's case. There was no necessity for this court to hear rebuttal evidence from the accused. Sharma J in *Public Prosecutor v Saiman & Ors* [1971] 2 MLJ 16 had stated:

H ... the court is not entitled merely for the sake of joy of asking for an explanation or the gratification of knowing what the Accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.

I [48] Premised on the above discussion and a maximum evaluation of the evidence adduced, the accused was therefore acquitted and discharged on all the four charges.

Accused acquitted and discharged.

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Reported by K Selvaraju

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